

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Murphy
34330

FILE: B-221356

DATE: May 2, 1986

MATTER OF: KISS Engineering Corporation

DIGEST:

Where a solicitation requires offerors to propose a single daily rate for preparing appraisal reports, but is ambiguous as to the meaning of a "Total Daily Rate" and does not estimate the length of time necessary for the work or otherwise relate the daily rate to the price of work orders to be negotiated for each appraisal report, it is deficient since bidders are unable to compete on an equal basis and the rate is not related to the probable cost to the government of competing proposals.

KISS Engineering Corporation protests the rejection of its proposal submitted in response to request for proposals (RFP) No. DACW69-85-R-0044, issued by the United States Army Corps of Engineers. The Army found the proposal to be technically unacceptable for failing to propose a single daily rate for performing the work, which involves the preparation of appraisal reports. KISS contends that a single rate was not required, and that its proposal complied with the pricing requirements of the solicitation.

We sustain the protest.

The Army sought offers to prepare between 5 and 36 reports appraising the value of oil, gas and other subsurface properties underlying land in and around the Stonewall Jackson Lake Project in Lewis County, West Virginia. The RFP, issued on August 6, 1985, stated that separate fixed-price work orders would be negotiated with the contractor for each appraisal report ordered. The solicitation listed the following evaluation factors in descending order of importance: specialized experience in

035326

the work required; cost; qualifications and capabilities of principals, supervisors, and personnel; experience in the general geographic area; capability to complete acceptable and quality work in the required time; volume of previous Department of Defense work; and experience as an expert appraisal witness in federal court.

The description of the second factor in importance, "cost of work," stated that offerors must submit price proposals and daily fees for any required court testimony. The solicitation included a schedule for offerors to insert a "Total Daily Rate," a "Per Diem Rate," "Travel (Mileage)," and a "Fee for attending pre-trial conferences and [providing court] testimony." Each of these proposed rates was to be on a per day basis except mileage, which was to be on a per mile basis. The only other indication of what the Army desired in price proposals was the following statement, which appeared in the section concerning evaluation factors for award and which is central to the issue in this protest:

"As part of the proposal, each offeror must indicate the total daily rate for all those disciplines necessary to accomplish the work described herein. Total daily rates shall include all overhead allowances authorized, profit, labor, plant, equipment, and materials to perform each work order. Travel expenses and per diem will not exceed the amounts specified in JTRs [Joint Travel Regulations] for government employees"

In its schedule, KISS noted "See Proposal" following "Total Daily Rate" and in the proposal itself included a schedule of fees listing hourly and daily rates for six categories of employees. On September 26, the Army notified KISS that its proposal had not been considered since the agency could not determine the firm's intended price from the schedule. The Army considered KISS' failure to provide a single combined rate for all employees to be a material deviation from the requirements of the solicitation. KISS initially protested to the Army and, following a denial by the agency, filed this protest. The Army awarded a contract to MSES Consultants, Inc., without conducting discussions, but performance has been suspended pending our decision.

The Army argues that to the extent the protester complains of an ambiguity in the RFP or asserts that the solicitation is unreasonable, the protest is untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), require that protests based upon alleged improprieties in a solicitation that are apparent before the closing date for receipt of initial proposals must be filed by that date. Thus, the Army argues that the ambiguity here was apparent on the face of the solicitation and should have been raised before proposals were due on September 6.

KISS' protest is not that the solicitation was ambiguous, but that the only reasonable interpretation of the solicitation is that it required offerors to propose daily rates for each discipline involved in the work, rather than one rate for the entire effort. The protester contends that the RFP language quoted above, requiring "rates" to include overhead and other costs, indicates that multiple rates were desired. KISS also contends that the reference to a "Total Daily Rate" for all disciplines could refer to a separate rate for each.

The protester points out that the fixed price of the appraisal report for each tract of land will be separately negotiated, and will depend upon the size and mineral content of the tract, the number and type of necessary staff, and the estimated time required by each staff member. The RFP expressly states that "those disciplines necessary to accomplish each work order" will be considered in negotiating the price of each appraisal report. Therefore, KISS contends, it would not be reasonable to read the RFP as requiring only a single combined daily rate, since such a rate would have no meaningful relationship to the actual contract price. Conversely, daily rates for the various categories of employees required would have a direct relationship to the contract price, since the RFP provides that the skills required will be a factor in negotiating the price for each work order.

We believe that the protester presents a reasonable interpretation. Read as a whole, however, the solicitation is ambiguous, i.e., subject to more than one reasonable interpretation. The RFP requirement for offerors to indicate the "total daily rate for all . . . disciplines" could refer to separate rates for each discipline that represent a total of direct labor, overhead, profit and other allocable items. This view is supported by the RFP statement that "total daily rates" shall include overhead, etc. On the

other hand, the Army also offers a reasonable interpretation. "Total Daily Rate" could refer to a combination of rates into single rate, and this reading is supported by the fact that space for only one rate was provided in the schedule included in the RFP.

More importantly, we find the solicitation deficient in that it did not permit an accurate assessment of probable costs. Agencies must consider cost to the government in evaluating competitive proposals. 10 U.S.C.A. § 2305(b)(4) (West Supp. 1985); 48 C.F.R. §§ 15.605(b), 15.611(d) (1984); Aurora Associates, Inc., B-215565, Apr. 26, 1985, 85-1 CPD ¶ 470. The RFP, however, did not require offerors to describe how they determined their daily rate, to indicate how many days the average report might take them to prepare, or to specify any other costs except for mileage, per diem, and fees for court testimony. Thus, offerors might have estimated less intensive effort for longer periods in order to propose a lower daily rate.

It is not clear from the evaluation record in this case how the agency determined the "cost of work" factor, which was worth up to 25 percent of the available points, for each offeror. Since the highest-rated offeror for this factor only provided a single total daily rate, per diem and mileage (at the maximum allowable rates), and fees for court testimony, we conclude that the "Total Daily Rate" was the dominant, if not the sole, element of the Army's cost evaluation. We find no necessary relationship between this rate and the likely actual cost of the contract to the government. The price of each work order will not be determined by the contractor's daily rate--the price is to be separately negotiated considering "those disciplines necessary" and other individual factors related to the work or the particular tract to be appraised.

In short, for purposes of an award decision, "Total Daily Rate" would not necessarily indicate whether one offeror's proposal would be more or less costly than another's, and the KISS proposal should not have been rejected summarily for failure to provide it.

We therefore are recommending that the agency evaluate the KISS technical proposal and determine whether the firm is in the competitive range. (Two other offerors who apparently provided a single daily rate and scored slightly higher than the awardee on the cost evaluation factor do not

appear to be in this range, since their scores on the technical evaluation factors were extremely low. Their overall scores were 29 and 36 points, compared with the awardee's 92 points, and we assume they would not have had a reasonable chance for award.) A fifth offeror was also rejected as "nonresponsive." We cannot determine from the record whether this was also for reasons related to the cost evaluation factor. If so, its proposal also should be evaluated and a determination made as to whether that firm is in the competitive range.

Assuming that a competitive range of more than one will result, we recommend that the agency then conduct discussions and request best and final offers on a basis that will allow equal competition and that will obtain information the Army can use to determine the probable cost of accepting each offeror's proposal. If the outcome warrants, the awarded contract should be terminated for the convenience of the government.

We sustain the protest.

for Milton J. Horlan
Comptroller General
of the United States